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PRE-DEPOSIT PAYMENT UNDER THE GST REGIME

EVOLVING CONTROVERSY OR SETTLING THE KNOT?

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Introduction

In the recent past, the Orissa High Court[1] has pronounced a judgment on the manner of making payment of pre-deposit of disputed amount while filing an appeal under the Goods and Services Tax (**"GST"**) Laws. Through the ruling, it has been held that the amount of pre-deposit is to be paid *via* the electronic cash ledger and not the electronic credit ledger. This ruling has caused a stir in the industry in as much as it would hinder utilization of credit balance to the extent of pre-deposit and would result in upfront cash outflow in the hands of the businesses. The present article seeks to examine the legal position under the GST laws on the manner of pre-deposit payment, in light of the ruling of the Orissa High Court.

Analysis

In terms of Section 107 of the Central Goods and Services Tax Act, 2017 (**"CGST Act"**)[2], pre-deposit payment is a statutory requirement to be fulfilled prior to filing of an appeal before the Appellate Authority against an order passed by the Adjudicating Authority. Sub-section (6) thereof provides that no appeal shall be filed unless payment of the admitted amount along with ten percent of the *"remaining **amount of tax** in dispute"* arising from the order is made. Sub-section (7) states that where the amount under Section 107(6) has been paid, "*the recovery proceedings **for the balance amount** shall be deemed to be stayed"*.

In other words, pre-deposit is nothing but payment of a specified percentage of the disputed ***amount of tax*** before filing of an appeal, which would lead to an automatic stay against the recovery proceedings of the disputed demand raised by the department.

At this juncture, we would like to dwell upon the provisions of Section 73/74 of the CGST Act. On perusal of the said provisions, one may observe that the disputed demand of tax adjudged under Section 73/74 of the CGST Act, against which the pre-deposit is to be made, is essentially tax chargeable on outward supply under the GST laws, i.e., in the nature of **"output tax"**[3].

The mechanism for payment of such amount of tax is specified under Section 49 of the CGST Act. Sub-section (2) provides that the input tax credit as self-assessed in the return shall be credited to the electronic credit ledger and sub-section (4) states that the *"**amount available in the electronic credit ledger** may be used for making **any payment towards output tax** under this Act or under the Integrated Goods and Services Tax Act"* in the manner as prescribed. Accordingly, it can be inferred that payment of the tax chargeable under GST Law, i.e., output tax can be made by utilization of the credit balance.

Further, it is evident that no restriction has been imposed under Section 107 or Section 49 of the CGST Act on the mode of payment of tax required for pre-deposit. In the aforesaid backdrop, one may argue that in the absence of a specific embargo prohibiting an assessee to adjust the credit balance available against a portion of the liability created by an order to be appealed against, such an adjustment is admissible[4]. The aforesaid intention is also reflected through the GST Portal, wherein the input tax credit balance is allowed for adjustment at the time of payment of pre-deposit before filing the appeal.

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[1] *Jyoti Construction* v. *Deputy Commissioner of CT & GST, Barbil Circle, Jaipur* [W.P.(C) No. 23508 of 2021 (Orissa High Court), decided on October 7, 2021]

[2] Pari materia provisions under respective State Goods and Services Tax Act, 2017

[3] Section 2(82) of the CGST Act states that *"output tax" in relation to a taxable person, means the tax chargeable under this Act on taxable supply of goods or services or both made by him or by his agent but excludes tax payable by him on reverse charge basis.*

[4] Rationale drawn from *Akshay Steel Works Private. Limited* v. *Union of India* 2014 (304) ELT 518 (Jhar.)

Even the settled legal position and jurisprudence under the erstwhile Central Excise Laws[5] suggests that the utilization of CENVAT Credit balance for payment of the pre-deposit was duly allowed. The principle laid down by the courts[6] also signifies that the credit balance in an assessee's CENVAT account is duty which has already been suffered and can be encashed for specified purposes. Applying such rationale under the GST laws, the credit balance, which is nothing, but tax already paid by the assessee at the input stage, should be allowed to be adjusted at the time of making the pre-deposit under the statute.

Be that as it may, while arriving at its conclusion on the subject matter, the Orissa High Court relied upon Section 41(2) of the CGST Act[7] and held that the credit balance cannot be debited to make payment of pre-deposit under Section 107(6) of the CGST Act. One of the vital aspects that has not been considered by the Court is that Section 41(2) merely states that credit shall be utilised only for payment of self-assessed output tax and does not in any manner specify the mode of payment of such output tax. Such mechanism of payment has been provided under Section 49 of the CGST Act, under which there is no bar towards adjustment of the electronic credit ledger while making pre-deposit.

The Court has also not provided any concrete findings on why the meaning of "***output tax"***[8] could not be adopted while analyzing Section 107(6), which uses the terminology "ten per cent of the remaining ***amount of tax in dispute***". Another point of contention which was not placed for consideration before the Court and requires evaluation is when the balance amount deemed to be stayed under Section 107(7) of the CGST Act is in the nature of tax, the amount paid under Section 107(6) of the CGST Act is also nothing but tax itself. In our view, this issue requires a purposive interpretation of the laws and an in-depth analysis thereon in as much as no bar has been contemplated under the GST Laws.

Conclusion and Recommendation

All in all, if the interpretation purported to be espoused by the Court is adopted, it would lead to a differential treatment between two assessees, which is explained by the following illustration. Companies A and B have a confirmed tax demand of INR 10 lakhs and equivalent electronic credit ledger balance of INR 10 lakhs. In such a scenario, if A chooses not to file an appeal, it would be allowed to adjust the tax liability through its electronic credit ledger. However, if B chooses to file an appeal against the same, it would be required to make the payment of pre-deposit of 10%, i.e., INR 1 lakh via the electronic cash ledger. This differential treatment, where on one hand the assessee who does not prefer an appeal is allowed the right to adjust the credit balance and on the other hand the assessee who prefers an appeal is deprived of such right, seems to be irrational and untenable.

Having said that, we expect that the Government addresses the apprehension of the industry at large by issuing a clarification on the adjustment of credit balance for making the pre-deposit at the earliest.

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[5] Section 35F of the Central Excise Act, 1944 read with Rule 3(4) of CENVAT Credit Rules, 2004; Circular F. No. 15/CESTAT/General/2013-14, dated August 28, 2014.

[6] *Cadila Healthcare Pvt. Ltd.* v. *UOI 2018 (18) GSTL 30 (Guj.), India Casting Company* v *CEGAT, New Delhi 1998 (104) ELT 17 (All.)*

[7] Section 41(2) of the CGST Act states that: *"The credit referred to in sub-section (1) shall be utilised only for payment of self-assessed output tax as per the return referred to in the said sub-section"*

[8] Section 2(82) of the CGST Act.

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